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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 1040

ROBERT C. WHITNEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1071

ROSARIO GAMBINO AND JOSEPH LIMA, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1073

FRED OSTRANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered in these cases by either court below, the judgment of the District Court in each case being affirmed *per curiam*.

JURISDICTION

The judgments of the Circuit Court of Appeals sought to be reviewed were entered January 28, 1927. (No. 1040, R. 58; No. 1071, R. 92; No. 1073, R. 65.) The petition for a writ of certiorari in No. 1040 was filed April 12, 1927, and those in Nos. 1071 and 1073, April 20, 1927. Jurisdiction to issue the writs applied for is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the searches of automobiles and seizures of the liquor they contained were made upon probable cause.

2. If not, whether the searches and seizures, made in these cases by State officers, were subject to the requirements of the Fourth Amendment.

STATEMENT

These three cases were heard together in the court below (No. 1071, Pet. 26; No. 1073, Pet. 28); the petitioners were there represented by the same counsel who prepared the petitions for certiorari filed in this Court, and the questions presented by the petitions are substantially alike. In these circumstances we have undertaken to deal with the three petitions in a single opposing brief, although searches of different automobiles are involved.

No. 1040

The petitioner Whitney was charged in a criminal information filed in the District Court of the

United States for the Northern District of New York with the possession and transportation of five quarts of Scotch whiskey in violation of the National Prohibition Act. (R. 3, 4.) The information was based upon the finding of the liquor in an automobile driven by the defendants, upon a search thereof by troopers of the State of New York. (R. 21, 22, 23.) Prior to trial the defendant moved for a suppression of evidence and for an order directing the return to him of the seized property, on the grounds that the property was seized for violation of the National Prohibition Act by the State troopers acting under a general understanding or arrangement with the Federal prohibition authorities; that the search and seizure were without a search warrant and without probable cause, and therefore in violation of the defendant's rights under the Fourth Amendment; and that the use in evidence of the property seized would be repugnant to the Fifth Amendment. (R. 5–8.) After taking proof the District Court denied the motion, holding that the constitutional claims were not well taken as regards the action of the troopers as State officers and that the proof failed to show any such cooperation between the Federal and State authorities as would make the State troopers agents of the Federal Government. (R. 16–18.) Objections on the same grounds to the introduction by the Government at the trial of testimony regarding the search and seizure were overruled (R. 19), and the

defendant was convicted on both counts (R. 41) and sentenced to pay a fine of $500 (R. 42).

No. 1071

In this case an indictment in four counts was returned in the same Federal court against the petitioners Gambino and Lima. The first count charged a conspiracy to violate the National Prohibition Act and customs laws by importing into the United States and transporting in and through the Northern District of New York a large quantity of intoxicating liquors fit for beverage purposes and containing more than one-half of one per centum of alcohol. As an overt act in furtherance of said conspiracy, the indictment alleged that the defendants had gone into Canada in a Buick roadster and had obtained a load of Canadian ale which they had imported into and transported within the said Northern District. The second, third, and fourth counts, respectively, charged the substantive offenses of importing intoxicating liquor from Canada into the said judicial district, and of possessing and transporting intoxicating liquor within said district "contrary to the form of the statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act." (R. 19–23.)

As in Case No. 1040, the charges against the defendants were based upon the finding by troopers of the State of New York of the intoxicating liquor in an automobile in which it had been transported

by the defendants. (R. 28–31.) There was likewise a motion in advance of trial for the suppression of evidence and for an order directing the return of the seized property. The motion in this case, however, failed to allege that in making the seizure the State officers were acting in pursuance of a general understanding or arrangement with the Federal authorities. It asserted only that the search and seizure were made without a warrant and without probable cause, in violation of the defendants' rights under the Fourth, Fifth, and Sixth Amendments, and that the seized property and persons of the defendants were turned over by the State officers to Federal officials for prosecution in the Federal court. (R. 23–26.) The motion was overruled. (R. 27.) No objection was made by the defendants at the trial to the introduction of evidence relating to the search and seizure until the Government's fifth and final witness had taken the stand. The objections then interposed and overruled were to testimony of the Government's chemist regarding the contents of a sample of the seized liquor, the ground of objection being that the search and seizure by which the State officers had procured the sample were without warrant of law, State or Federal, and in violation of the defendants' rights under the Fourth, Fifth, and Sixth Amendments. (R. 50, 51, 61.) The defendants offered no evidence, but at the close of the Government's case moved for a directed verdict on each count. The motion was sustained as to the second, or importa-

tion, count, but was overruled as to the remaining three counts. (R. 64–66.) The jury returned a verdict of guilty against both defendants upon the first, third, and fourth counts (R. 81), whereupon each defendant was sentenced to confinement in the Federal penitentiary at Atlanta, Georgia, for one year and a day, and to pay a fine of $10,000. Regarding the fine, the court in rendering judgment said (R. 82):

> Now, if they have any property I would not fine them ten thousand dollars, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the Penitentiary, Atlanta, Georgia, to be after the expiration of the prisoner's sentence.

No. 1073

This was a criminal information filed in the same District Court charging the petitioner Ostrander with the possession and transportation of 10 half barrels of beer for intoxicating beverage purposes. (R. 3, 4.) As in the two preceding cases, the prosecution was based upon the finding of the intoxicating liquor by troopers of the State of New York in an automobile driven by the defendant. Here, also, a preliminary motion was filed to restrain the use of evidence and for an order directing the return of the seized property. The grounds of the motion were that the search and seizure by the State officers

were without warrant or authority in law and in violation of the defendant's rights under the Fourth and Fifth Amendments, and that—

> the seized property and person of the defendant were turned over by the said State Troopers to Federal officers under a general arrangement or understanding between the Federal Prohibition Agents and New York State Policemen whereby said Policemen customarily make such arrests, searches and seizures and turn the person arrested and the property seized over to Federal Prohibition Agents for prosecution in United States District Court. (R. 6–8.)

After hearing the testimony of the State officers as to the instructions under which they were acting in making the search and seizure and as to the circumstances under which the search and seizure were made (R. 9–23), the court denied the motion (R. 24, 25). Similar objections at the trial to evidence offered by the Government relating to the search and seizure were overruled. (R. 27, 28, 29, 30, 35.) The trial resulted in a verdict of guilty upon both counts (R. 47) and the defendant was sentenced to pay a fine of $500 (R. 48).

As hereinbefore stated, the judgment in each of the foregoing cases was affirmed by the Circuit Court of Appeals without opinion. This Court is now asked to grant writs of certiorari in these cases upon the following grounds:

1. That in making the searches and seizures the State officers were acting as agents of the United

States and were therefore subject to the restrictions and limitations of the Fourth Amendment.

2. That the searches and seizures were made without search warrants and without probable cause, and that in denying the petitioners' motions for a suppression of evidence and for the return of seized property, as well as in overruling their objections to the introduction of evidence relating to the searches and seizures, the District Court denied to them rights guaranteed by the Fourth, Fifth, and Sixth Amendments.

ARGUMENT

I

THE SEARCHES AND SEIZURES WERE MADE UPON PROBABLE CAUSE

In the *Whitney case* (No. 1040) the evidence showed that on April 17, 1925, Troopers Krass and Drumm were on the highway between Mount Upton and Morris near Gilbertville, in the State of New York, looking for a Buick coupé, License No. 6J–43–66, driven by the defendant, upon the complaint of a private citizen that the defendant was transporting intoxicating liquor in said machine. (R. 19, 22, 31.) Upon the approach of the defendant in the car bearing the specified license number, the officers stopped him and asked for his license and whether he had any liquor in the car. The defendant denied that he had any liquor and the officers asked him whether they might look in the car. The defendant then got out

and opened up the back compartment of the coupé, disclosing a handbag in which he said there were some personal belongings. The officers thereuopn informed him that they had information concerning his activities and asked whether he would show them what he had in the grip. He replied that he had five quarts of liquor (R. 20, 32), and then unstrapped and opened the grip, which was not locked, revealing five quarts of liquor therein. The officers then placed him under arrest and took the car and liquor into custody. (R. 21, 22, 25, 32, 33.)

Aside from the fact, disclosed by the foregoing evidence, that the presence of the liquor in the defendant's automobile was made known to the officers without any actual search by them, it will be noted that in stopping the car and questioning the defendant the officers were acting upon specific information that the defendant was illegally transporting liquor in said automobile. In *Carroll* v. *United States*, 267 U. S. 132, 158, this Court very clearly intimated its opinion that to justify a search of an automobile for contraband liquor it is not essential that the officer be apprised by the evidence of his senses that the liquor is contained in said vehicle, but that the probable cause for belief necessary to authorize the search may have been acquired by the officer from information previously received by him. And in the same case (p. 159) it cited with approval the following cases in which searches of automobiles solely upon information

conveyed to the officers that the automobiles were being used for the illegal transportation of liquor, were sustained: *Lambert* v. *United States* (C. C. A., 9th), 282 Fed. 413; *Milam* v. *United States* (C. C. A., 4th), 296 Fed. 629; *Ash.* v. *United States* (C. C. A., 4th), 299 Fed. 277.

In the *Gambino case* (No. 1071) Trooper Carroll testified for the Government that on August 1, 1925, while he and Trooper Travis were patrolling the Messena-Hogansburg road in a Ford car they met the defendants Gambino and Lima driving toward Messena in a Buick roadster; that the officers observed that the license plate of the defendants' car was from the central part of the State and that the rear end of the car "hung pretty low" (R. 28); that the witness had been stationed along the northern border for more than three years and had considerable experience with cars transporting liquors, and that "cars loaded or hanging that way have usually been loaded with booze coming from the border"; that the troopers turned their car and followed the defendants' car to Rayno's Garage in the village of Messena, where it stopped; that after asking for and being shown Gambino's registration card, the witness asked him what he had in his car and was told to find out; that the witness then asked Gambino for the key, but the request was refused; that the witness thereupon shook the end of the car and heard bottles rattle (R. 29, 38, 39); that the reputation in that section of Rayno, the proprietor of the garage, was that he was a bootlegger; that

the defendants and the Buick car were taken to the police station in Messena, where the witness again asked for the key and was told to go ahead and find it; that the witness then found the key in the left side pocket of the car, and opening the rear end of the defendants' car found therein fourteen cases of Canadian ale (R. 31). On motion of the defendants, the court struck out that part of the testimony which described the contents of the bottles as Canadian ale and refused to permit the witness to describe the labels on the bottles, on the ground that the labels themselves were the best evidence of that. (R. 31.) Later, however, the Government was permitted to show by another witness that at the time of its seizure the Buick roadster contained 336 bottles of Canadian ale. (R. 46.) The testimony of Trooper Carroll was corroborated by that of Trooper Travis, who additionally testified that Hogansburg was on the border line of Canada fourteen miles from Messena. (R. 34.)

It is submitted that where, as in this case, experienced officers patrolling a highway in the vicinity of the Canadian border observe a heavily loaded automobile proceeding from the direction of the border stop at the place of a well-known bootlegger and before any search or arrest is made discover that the load is contained in bottles, they have probable cause for belief that the automobile is being used for the illegal transportation of intoxicating liquor.

In the *Ostrander case* (No. 1073) Trooper Deveans, called as a witness for the Government on the hearing of the preliminary motion to suppress evidence, testified that on May 14, 1925, he was patrolling the highway between Utica and Rome; that about midway between those two points he passed the defendant, who was driving a Dodge truck very slowly up hill; that one side of the truck "was pretty well down on the 'X' "; that the witness drove down to the foot of the hill and then turned, drove back, and stopped the defendant as he reached the top of the hill; that the witness asked the defendant for his chauffeur's license, and as the defendant reached to get it from an inside pocket he exposed a revolver carried by him in a holster; that upon the request of the witness the defendant handed over the revolver to him and showed him a permit authorizing the defendant to carry it. (R. 9, 10.) In the language of the record, the witness further testified (R. 10):

> I asked him what the reasons were for carrying the gun, and he claimed or said to me that his father was held up by hijackers east of Utica, and he carried this gun for that purpose, that he wasn't going to be held up; and then I asked him what he had on the truck and he said "beer." I says, "What kind of beer?" and he said "Good beer." I said, "Where did you get it?" and he said, "In Rome." And then I went back of the truck and only a small cardboard or cardboards on the back of the window in the rear

> of the truck, and I said, "What have you got it in; barrels?" He said "Yes." I said, "How many?" and he said "Ten halves," and I looked in and noticed ten half barrels of beer.

At the trial the foregoing testimony was in substance repeated by Trooper Deveans, who additionally stated that he was accompanied at the time by Trooper Greeb; that when the defendant said he had beer on the truck the witness told him to turn around and drive back to the barracks; that Greeb rode back with the defendant to the barracks and the witness followed on a motor cycle; that the witness thereafter arraigned the defendant before Commissioner Wallace at Canastota, and the first sergeant notified the Federal officers to come for the truck and the beer. (R. 26, 27.) Deveans's testimony was fully supported by that of Trooper Greeb. (R. 28, 29.)

Even upon the assumption that the officers who made the seizure in this case were Federal agents, they were also charged with duties under the State law. Whether they had authority under that law to stop the defendant and ask for his chauffeur's license is not a matter of Federal cognizance. Before addressing any inquiry to the defendant to ascertain what he had on the truck, the officers discovered that he carried a revolver in a holster and that he did so to protect himself against "hijackers"—that is, persons who make it a business of robbing vehicles of intoxicating liquor. It can

not be doubted that with this information in their possession the officers, even as Federal agents, were warranted in asking the defendant what he had on his truck, and that his answer that it was "good beer" justified them in taking him and the truck and its contents into custody. The findings of the trial court, affirmed by the Circuit Court of Appeals, that probable cause existed, have support in the record and should not be disturbed.

II

THE STATE OFFICERS WERE NOT AGENTS OF THE UNITED STATES

As the record establishes the existence of probable cause, the question whether the searches were Federal and governed by the Fourth Amendment, as applied to a search without probable cause, may not be reached, but it will nevertheless be discussed.

In the evident realization that the Fourth Amendment applies only to the Federal Government and its agencies (*Twining* v. *New Jersey*, 211 U. S. 78, 92; *Weeks* v. *United States*, 232 U. S. 383, 398; *Burdeau* v. *McDowell*, 256 U. S. 465, 475), the petitioner Whitney (Case No. 1040) endeavored in the District Court to establish, by examination of the State troopers, that in making the search and seizure those officers were acting in pursuance of a general arrangement or understanding between the State and Federal authorities that the State officers would aid the Federal officers in enforcing the Federal laws relating to the traffic in

intoxicating liquor, the theory being that if such an arrangement or understanding could be shown, the State troopers would be held to have acted as Federal agents. The answers elicited failed to disclose any such arrangement or understanding. They showed only that the troopers had proceeded under the instructions of their superiors, that they should be on the lookout for vehicles transporting intoxicating liquors in violation of the Federal law, and that whenever such violations were discovered by them they should take the offenders and the liquor and transporting vehicles into custody, arraign the offenders under the Federal law before a United States Commissioner, and turn the seized property over to the proper Federal officers. (No. 1040, R. 8–11.) There was no proof whatever to support the claim now advanced by petitioner that in making the search and seizure the State troopers were acting under the authority conferred upon "any officer of the law" by Section 26 of the National Prohibition Act. On the contrary, as above indicated, the testimony was that the troopers were acting solely by direction of the State authorities from whom they received their orders.

It appearing, therefore, that no Federal officer or agent had participated in the search, seizure, and arrest made by the State officers, the District Court was under no obligation to inquire into the legality of these acts of the State officers.

McGrew v. *United States* (C. C. A., 9th), 281 Fed. 809, 811.

Coates v. *United States* (C. C. A., 4th), 290 Fed. 134, 135.

Hirata v. *United States* (C. C. A., 9th), 290 Fed. 197, 198.

Robinson v. *United States* (C. C. A., 9th), 292 Fed. 683, 684–685.

Riggs v. *United States* (C. C. A., 4th), 299 Fed. 273, 274.

Nunn v. *United States* (C. C. A., 9th), 4 F. (2d) 380, 381.

Schroeder v. *United States* (C. C. A., 2nd), 7 F. (2d) 60, 62.

Elam v. *United States* (C. C. A., 8th), 7 F. (2d) 887, 888.

See *Byars* v. *United States*, No. 72, Oct. Term, 1926; decided by this Court January 3, 1927.

There was no proof in either the *Gambino* or the *Ostrander case* that the State officers were acting as Federal agents when making the search and seizure. The only evidence upon the point in the *Gambino case* was a statement by Trooper Carroll in a deposition filed by the Government in opposition to the motion to suppress evidence. After describing therein the circumstances under which he and Trooper Travis had made the search and seizure, Trooper Carroll stated:

> Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal Officers. (No. 1071, R. 28.)

In the *Ostrander case*, following a lengthy cross-examination of the Government's witness, Trooper Deveans, to bring out the practice followed by the

State troopers when violations of the National Prohibition Act were discovered by them, it was stipulated between counsel that where arrests were made by the State troopers for alleged violations of the National Prohibition Act those officers appeared against the offender before the United States Commissioner and the man was held for prosecution by the District Attorney's office. (No. 1073, R. 23, 24.) It is submitted that these record references fall short of establishing that any Federal agency was involved in the searches and seizures made in these cases unless the fact that the State officials direct the State police to make such seizures and arrests and turn the evidence over to Federal authorities is enough in itself to make the search a Federal one.

CONCLUSION

The records in these cases disclose no ground for the application of the constitutional provisions relied upon by the petitioners. They show, furthermore, that even if applicable, those provisions were not infringed. The petitions should therefore be denied.

Respectfully submitted.

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MAY, 1927.

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